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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LORENZO LORTA,

Defendant and Appellant.

B200270

(Los Angeles County
Super. Ct. No. PA054705)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Harvey Giss, Judge. Affirmed and remanded with instructions.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmond G. Brown, Jr., Attorney General, Dane Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E.
Winters and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lorenzo Lorta challenges his convictions and sentences for kidnapping for child molesting in violation Penal Code section 207, subdivision (b)¹ and committing a lewd and lascivious act upon a child under the age of 14 in violation of section 288, subdivision (a). He argues the trial court and the prosecutor committed misconduct during the trial; that the court erred in instructing the jury on the enhancement contained in section 667.61 and sufficient evidence did not support the jury's true finding on the enhancement. He further contends that his 85-years to-life sentence amounts to cruel and unusual punishment under federal and state law and points out an error in the abstract of judgment. As we shall explain, only the claim concerning the abstract of judgment has merit. The court did not commit misconduct resulting in prejudice when it asked questions during appellant's examination; nor did the prosecutor improperly question appellant's character witness or vouch for the victim. Likewise sufficient evidence supported the kidnapping enhancement and the court properly instructed on it. Finally, appellant's sentence does not shock the conscious in view of his crimes and criminal history. Accordingly, the judgment as modified is affirmed.

BACKGROUND AND PROCEDURAL HISTORY

On the afternoon of March 3, 2006, R.P., aged 12, her 13-year-old sister A.P., and a friend skipped school and went to the Wal-Mart in Van Nuys. While A.P. and the friend were elsewhere in the store, R.P. went to the second floor into the music section. She took three compact discs (CDs) and went into the women's restroom. R.P. then removed the packaging and put the CDs in the front pocket of her sweatshirt.

¹ All statutory references are to the Penal Code.

As she left the restroom she encountered a man, later identified as appellant, standing nearby wearing a hard hat and tool belt.² Appellant made eye-contact with R.P. and made a motion with his index finger for her to come towards him as he said “Come here.” R.P. complied. R.P. believed appellant was a Wal-Mart employee. She figured she had been caught shoplifting and was afraid of what her mother would do when she found out. Appellant led R.P. to a breakroom. Appellant told R.P. that he had observed her on a monitor unwrapping the CDs; he asked her to give him the CDs, which she did. He examined the CDs and asked her age. She told him she was 12. He handed the CDs back to her and told her to put them in her pocket. Appellant then told R.P. they were going to sign some papers and he led her out of the breakroom towards an employee-only, private area of the lay-away section. R.P. believed appellant was taking her to the store manager’s office to sign papers related to her shoplifting.

A.P. had begun looking for R.P. in the store when she saw R.P. following appellant as they walked towards the lay-away section. A.P. asked R.P. what happened and R.P. related appellant had caught her stealing. A.P. also believed appellant was a store employee.

R.P. followed appellant through the lay-away section to the employee’s elevator. R.P. testified that she would not have followed appellant if she had known he was not a Wal-Mart employee. When they got into the elevator several Wal-Mart employees were present; they asked appellant about R.P. and he responded that she was a friend. R.P. and appellant rode in the elevator to the ground floor. From the elevator appellant led R.P. past the optometry section and out of the store.

Once outside the store, appellant lead R.P. to his car in the parking lot near the garden section. He told her to get in and when she asked “Why, where are we going?” appellant told her to “Just get in the car.” R.P. testified that she got into the passenger

² Appellant was part of a work crew from a company that Wal-Mart had contracted with to work on the air conditioning system at the store.

side, but that she was afraid because she did not know why they were getting in his car. Appellant put his hat and tools in the back seat and then got in the driver's side. Once inside he asked R.P. where she lived. She told him "far away." He also asked her phone number and where she attended school, but she did not tell him. Appellant started the car and drove to the other side of the parking lot on the west side of the store. Appellant stopped the car and told her to give him the CDs, and R.P. handed them to him. He put them in the glove box. Appellant then told R.P. that he needed to check her to see if she had anything else.

According to R.P. appellant then put his hand under her sweatshirt and T-shirt and rubbed her stomach a number of times. He began to move his hands towards her breasts, but R.P. crossed her arms over her chest. Appellant then put his hand under the waistband of her jeans and moved his hand back and forth a number of times. Appellant then slid his hands onto her inner thighs and rubbed both sides of them. He also placed his hand on R.P.'s vagina on the outside of her jeans and rubbed it up and down a number of times. At that point, R.P. told appellant that she was having her menstrual period and he told her she could leave. R.P. walked home.

Sometime after A.P. watched R.P. follow appellant towards the lay-away area, A.P. and the friend again began searching for R.P. in the store. When they were unable to find her, they approached a security officer in the store and reported that R.P. had been caught shoplifting and inquired about R.P.'s whereabouts. The security guard told them that no one was in the store's custody. A.P. then described appellant to the officer. The officer, and the girls began to search the store and the surrounding mall for R.P. and were joined in that effort by the store manager and another security officer. About 45 minutes after they began the search, A.P. spotted appellant on the ground floor of the Wal-Mart leaving the store with his jacket. A.P. informed the security officer that appellant was the man she had seen with her sister. The security officer stopped appellant. The security officer asked appellant if he had escorted a girl out of the store, and appellant admitted that he had. Appellant produced some CDs and gave them to Wal-Mart personnel.

After R.P. arrived home, she did not tell her mother what had happened. Her mother called A.P. and told her to come home. Shortly thereafter, the police arrived and interviewed R.P. and she told them what happened.

Appellant was arrested. In an tape-recorded interview³ by police detectives, appellant admitted that he had observed R.P. attempting to steal the CDs from Wal-Mart and that he counseled her in a breakroom because he knew she was going to get into trouble. He stated that R.P. gave him the CDs and that as he escorted her out of the store he gave the CDs to a “supervisor.” He said that the CDs never left the store and that he gave them to security before they walked out. He said that he did not turn R.P. over to security because he wanted to spare her from juvenile hall. Once outside the store he offered to give her a ride home, which she accepted, but when she would not tell him where she lived he stopped the car in the parking lot and told her to get out. When he was asked whether he searched her or touched her, appellant denied it. Later in the interview, appellant told the detective he was going to be “honest.” He stated that when they were in the car he thought that R.P. might have something else that belong to Wal-Mart so he reached over and “tapped her” in the stomach. He denied touching her in any other way or touching beneath her waist band.

Appellant was charged with one count of kidnapping a person under 14 years of age in violation of sections 207, subdivision (a) and 208, subdivision (b) (Count 1); one count of kidnapping for child molesting in violation of section 207, subdivision (b) (Count 2); and one count of committing a lewd and lascivious act upon a child under the age of 14 in violation of section 288, subdivision (a) (Count 3). Also as to Counts 1-3, he was charged with kidnapping in violation of section 667.61, subdivisions (a) and (d). As to Count 3 it was also alleged that appellant kidnapped the victim, who was under the age of 14 in violation of section 667.8, subdivision (b); that appellant had suffered two

³ The transcript of the interview was introduced into evidence at trial.

convictions of serious or violent felonies within the meaning of 667, subdivision (a)(1); and that appellant had served three prior prison terms.

During the trial, in addition to the testimony of R.P., A.P., the police detective, and Wal-Mart security personnel, appellant testified on his own behalf. At the outset of his testimony, appellant described his criminal history. He conceded that he had two felony convictions for residential burglary (one in the 1980s and the second in the early 1990s) and a felony conviction escape (with force or violence) which he committed while in custody for a prior burglary. He admitted he was “paroled” on the second burglary conviction in June of 2004 and then was free for about a year and nine months before he was arrested for this offense. He stated that he had never committed or been investigated for a sex crime.

He further testified that he learned how to repair air conditioning units while in prison. When he was released he obtained a job with a company that had been hired to replace the air conditioning units in the Van Nuys Wal-Mart. He testified that he worked on the roof and from that vantage point he observed a number of people shoplifting. He was also aware that Wal-Mart had security cameras posted all around the store.

He told the jury that he observed R.P. put the CDs in her sweatshirt pocket when she was in the music section. He stated that he walked over to her and told her to put them back or that she would get in trouble, and then he walked away. Appellant stated that he saw R.P. again as they were both coming out of the restroom. He decided to give her a few more words of advice. He told her that the store had security cameras. Appellant admitted that he escorted her to a breakroom where he asked her a number of questions including her age, who was with her and where she lived. She told him that her mother was at home and that she lived far away. Appellant said that he was done working for the day and was going to give R.P. a ride home so he could discuss the matter with her mother. He wanted to help R.P. because when he was younger he had worked with troubled youth. Appellant denied asking for the CDs in the breakroom and stated that he believed that she had put them back after he first approached her in the music section.

Appellant conceded that he led R.P. through the employee areas of the store and they rode the elevator to the ground floor. He stated that when they encountered Wal-Mart employees in the elevator he told them that R.P. was his friend because he did not want to embarrass her. R.P. followed appellant out of the store to his car. According to appellant she willingly got in; he started to drive out of the parking lot when he realized that she still had the CDs in her sweatshirt. Appellant became worried because he had been told if he was caught with store property outside of the Wal-Mart he would be fired. He stopped the car and reached over and took the CDs from her; one of them was sticking out of her waist band so to retrieve it and in so doing made contact with her stomach. He then stated that he patted her down across the front sweatshirt pocket. He stated that he put the three CDs in his glove box. Appellant stated that he still intended to escort R.P. home, but when she would not tell him where she lived, he parked the car and told her to get out. Appellant then stated that he returned to the store to find a supervisor to report what had occurred so he would not be charged with her theft.

Appellant denied touching R.P. with an intention to sexually arouse himself or R.P. He denied touching, or rubbing R.P.'s stomach, thighs or vaginal area. He testified that when originally questioned by police detectives he lied about touching or searching R.P. because appellant was on parole at the time and was afraid the police would misconstrue his actions as child molestation.

Appellant's adult daughter, Jill Lorta, testified as a character witness. She told the jury that she often left her 10- and 6-year-old daughters with appellant while she worked. Ms. Lorta stated that appellant had never acted inappropriately with her children and that she had no hesitation in leaving her daughters with appellant.

The jury convicted appellant on counts 2 and 3⁴ and found all of the special allegations true. Appellant waived a jury trial on his prior convictions and after a bench

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The prosecutor subsequently moved to dismiss Count 1 in the interests of justice; the motion was granted.

trial, the court found the prior conviction allegations true. Appellant was sentenced to a total of 85 years to life.

Appellant timely filed this appeal.

DISCUSSION

Before this court, appellant asserts several errors: (1) the trial court committed misconduct when it examined him; (2) the prosecutor committed misconduct in questioning a character witness and in “vouching” for the victim; (3) cumulative errors; (4) the court erred in instructing the jury on the enhancement contained in section 667.61 and insufficient evidence supported the jury’s true finding on the enhancement; (5) his sentence amounts to cruel and unusual punishment under federal and state law; and (6) the abstract of judgment does not accurately reflect the sentence imposed by the court. We address these matters in turn.

I. Judicial Misconduct Claim

Before this court appellant claims the trial court engaged in instances of judicial misconduct when the court interjected questions during appellant’s testimony on direct and cross-examination.

A. Instances of Alleged Misconduct

Parole Status Questions. During his direct examination, appellant testified about the prior convictions he had suffered and the prison sentences he had consequently served. He admitted that he had been “paroled” in June 2004 from the prison sentence he served following his second residential burglary conviction and his conviction for escape with violence or force, which he suffered in the early 1990s. Notwithstanding his criminal history appellant testified that he was concerned about losing his job after the incident with R.P., and the court asked (“the parole” questions):

“[The Court]: Were you on parole at the time?

“[Appellant]: Yes, sir.

“[The Court]: Before this whole scenario began you didn’t ask yourself whether this could cause your parole to be violated, putting a 14 year old in your car?

“[Appellant]: Well –

“[Prosecutor]: 12, your honor.

“[Appellant's counsel]: 12.

“[Appellant]: After that, your honor –

“[The Court]: Yes or no.

“[Appellant]: Yes.

“[Appellant's counsel]: Wait. [¶] Do you understand the judge’s question? Did you ask yourself before this happened – did you think to yourself ‘this could violate my parole if, you know, if I’m accused of anything out of this’?

“[Appellant]: No, it never crossed my mind.

“[The Court]: You were just worried about losing your job, but not about parole?

“[Appellant]: Well, if I could explain to you.

“[The Court]: I’ll let your lawyer.

“[Appellant's counsel]: What’s your explanation?

“[Appellant]: Well, after I went to explain to the manager – I mean to the supervisor – then I had two other people to report this to Monday morning. [¶] I had to report this to my boss; and then after I told my boss to give me an hour early to go talk to my parole officer that’s in Santa Fe Springs. I have to report all this or else I’ll be violated. I’ll violate probation - parole.”

Breakroom Camera Questions: During appellant’s testimony about his conversation with R.P. in the breakroom in Wal-Mart the following exchange occurred (the “breakroom camera questions”):

“[Appellant’s counsel]: So you and [R.P.] – wait. The CDs. At the time you’re in the break room with [R.P.] where are the CDs?

“[Appellant]: I didn’t see no [sic] CDs at that time.

“[Appellant’s Counsel]: Did you ever have her take them out?

“[Appellant]: No.

“[Appellant’s Counsel]: Did you ever say ‘take them out of your pocket; let me see them’?

“[Appellant]: No, but the camera should have caught all that.

“[Appellant’s Counsel]: You’re talking about the camera in the break room?

“[Appellant]: Yeah. The camera is taking all this down.

“[Appellant’s Counsel]: So you –

“[The Court]: Let me ask you a question. You said a camera is taking it down. What is the significance of that?

“[Appellant]: The cameras are recording everything that is happening in the break room.

“[The Court]: What did that mean to you? What was significant about that?

“[Appellant]: Well, he asked me if –

“[The Court]: I want to know what that meant to you that the cameras were taking it down if you were asked in here, not –

“[Appellant]: If she should have showed me anything the cameras would show, too.

“[Appellant’s Counsel]: Are you talking about if she had taken out property that you saw her boost from the store?

“[Appellant]: The cameras would have recorded it.

“[Appellant’s counsel]: The cameras would pick her up lifting something out of her pocket that she had taken?

“[Appellant]: Exactly.

“[Appellant's counsel]: And she'd be caught?

“[Appellant]: Yes.

“[Appellant's counsel]: On tape?

“[Appellant]: On tape.”

Store Camera Questions: At a later point while appellant was testifying about the surveillance cameras in the store, the court asked:

“[The Court]: Do you have any knowledge whether or not Wal-Mart wanted the public to know where their cameras were located or not?”

“[Appellant]: No, because –

“[The Court]: Were you giving away secrets in your opinion?”

“[Appellant]: No. I was just trying to keep them out of trouble.

“[The Court]: I see.

“[Prosecutor]: Did you hear Mr. Fuller [a Wal-Mart security representative] talk about - this is my characterization. You do not have to accept this. [¶] He seemed to show extreme caution about even revealing that there may not be camera coverage over the entire store. [¶] Do you remember that testimony from [him]?”

“[Appellant]: Yes.”

Counseling Shoplifter Questions: Appellant was asked questions about his observation of other people shoplifting in the store and his efforts to counsel them; the following questions were posed:

“[The Court]: You said you see them from overhead.

“[Appellant]: Yes. I work on the top. I disassemble the air conditioning.

“[The Court]: So you see through the roof, the ceiling.

“[Appellant]: I'm up there on the catwalks.

“[The Court]: So you come all the way down and talk to them.

“[Appellant]: Yeah, and I tell them, you know –

“[The Court]: Then you go back up to the catwalk.

“[Appellant]: Yes.

“[Prosecutor]: So you interrupt your work and come down and counsel them, and when you're done you go back up?”

“[Appellant]: Yes.”

R.P.'s Possession of the CDs Questions: When appellant was questioned about his interactions with R.P. concerning the CDs the court inquired:

“[The Court]: I just want to get one thing clear. Counsel just asked some questions. You never saw her take the wrappings off the CD boxes, right?

“[Appellant]: No.

“[The Court]: And you never – am I correct?

“[Appellant]: Yes.

“[The Court]: And you never saw her take the CD’s out of the box and throw the boxes away, correct?

“[Appellant]: Correct.

“[The Court]: So you thought she had the boxes with the CD or the covers with the CD still on her?

“[Appellant]: No, sir.

“[The Court]: You thought she still had the CDs?

“[Appellant]: No.

“[The Court]: When she was in the store before you went out with her?

“[Appellant]: No. I just seen [sic] her stealing; and I was going to take her to her mother to tell her mother that her daughter is stealing.

“[The Court]: She hadn’t left the store with the items, had she, at any time until you left the store with her?

“[Appellant]: See, I walked up to her and told her to please put those back because she’s going to get in trouble.

“[The Court]: And –

“[Appellant]: And I thought she put them back.

“[The Court]: And –

“[Appellant]: And she didn’t.

“[The Court]: How do you know?

“[Appellant]: Because I found them in the car.

“[The Court]: But you didn’t know before you left the store that she hadn’t put them back, right?

“[Appellant]: I wasn’t going to –

“[The Court]: Is that correct or not?”

“[Appellant]: Yes.

“[The Court]: So they hadn’t been stolen from the store at that time.

“[Appellant]: I was going to –

“[The Court]: She hadn’t left the store.

“[Appellant]: I was going to report what she was doing. I didn’t even know –

“[The Prosecutor]: May I continue, your Honor?”

“[The Court]: Please.

“[Appellant’s Counsel]: Had the witness finished his answer to the court?”

“[The Court]: You may finish your answer.

“[Appellant] Okay. When I left the store with her, I was going to report to her mother that her child was stealing and –

“[The Court]: But she hadn’t stolen them until she left the store, and she left the store with you, correct?”

“[Appellant]: Correct.

“[The Court]: They hadn’t been technically stolen in your state of mind at that time. She was getting ready to steal them, but she didn’t steal even them.

“[Appellant]: No, she didn’t, but –

“[The Court]: You answered the question.”

Search of R.P. in the Car Questions: When appellant discussed his effort in the car to search R.P. for the CDs the court and appellant had the following exchange:

“[The Court]: Did you ever ask her just to produce it before you reached for it? Did you say ‘would you take that out of your stomach’?”

“[Appellant's counsel]: I can’t hear the court.

“[The Court]: Did you ever ask her for it rather than reach for it?”

“[Appellant]: No, I –

“[The Court]: That’s enough. Thank you.

“[Appellant's counsel]: What made you decide not to just ask her to give it to you?”

“[Appellant]: Because I was – I got excited and I was thinking about losing my job. That's what was in my mind.”

Appellant's Post-Incident Conduct Questions: Appellant also cites his exchange with the court concerning what he did immediately after R.P. got out of the car and he was preparing to leave for the day:

“[The Court]: Were you off duty at the moment you left the store with [R.P.] the first time? Was your workday over?

“[Appellant]: I was still going back and forth.

“[The Court]: My question is was your workday over.

“[Appellant] : Yes, it was.

“[The Court]: So you could have gone home after [R.P.] left, right?

“[Appellant]: Yes.

“[The Court]: After she got out of your car?

“[Appellant]: Yes.

“[The Court]: But you went back into the store?

“[Appellant]: I had to report what happened.”

B. Forfeiture and Ineffective Counsel

The Attorney General asserts that appellant has forfeited any claims of judicial misconduct by failing to assert them in the trial court. As a general matter, claims of judicial misconduct are not preserved for appellate review if no objection is made in the trial court. (*People v. Cash* (2002) 28 Cal.4th 703, 730.)⁵ “The purpose of the rule requiring an objection is to give the trial court the opportunity to cure any error, if possible by an admonition to the jury.” (*People v. Melton* (1988) 44 Cal.3d 713, 735.)

⁵ The failure to assert these claims in the trial court also serves to bar appellate review of appellant's constitutional claims. (*People v. Hawkins* (1995) 10 Cal.4th 920, 945.)

Nonetheless, the failure to object does not preclude appellate review where the objection would have been futile because the court would have overruled it or where an admonition could not cure the prejudice caused by the misconduct. (*People v. Cash, supra*, 28 Cal.4th at p. 730.)

Appellant argues that the principles of forfeiture should not apply because the “substance and tenor” of the trial court’s comments indicate that the court would have overruled any objection and any admonition would not have cured the harm. We are not convinced. Based on our review of the record, we conclude an objection as to these matters would not have been counterproductive. At the very least an objection would have given the court an opportunity to explain on the record its purpose in asking questions, and would have given the court an opportunity to remind the jury, as the court did at the outset of the trial, that the jury should not take its cue from the court.

In any event, appellant argues that if an objection was required, then his counsel was ineffective for failing to assert it. To establish a claim of ineffective assistance of counsel, the defendant must prove both counsel’s representation was objectively deficient, below a reasonable standard of care under prevailing professional norms, and prejudice flowing from the deficient performance, that is, but for counsel’s errors, the defendant would have received a more favorable result. (*People v. Waidla* (2000) 22 Cal.4th 690, 718.) Defendant has the burden of proving an ineffective assistance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

Given the difficulties inherent in making this evaluation, this court indulges in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; appellant must overcome the presumption that, under the circumstances, the challenged action “might be considered a sound trial strategy.” (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.) “Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” (*Strickland v. Washington* (1984) 466 U.S. 668, 690-691.) In addition if the record sheds no light on why counsel acted or failed to act in the challenged manner, the court will reject the claim on appeal unless counsel was asked for an

explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Moreover, a reviewing court need not determine "whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*In re Fields* (1990) 51 Cal.3d 1063, 1079.) Defendant must affirmatively demonstrate prejudice. It is not sufficient for the defendant to show the error had some "conceivable effect" on the outcome of the proceeding; defendant must prove that there is a "reasonable probability," that absent the errors the result would have been different. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

Here as we explain below, appellant's counsel was not ineffective for failing to object because appellant has failed to demonstrate that any of the court's comments or questions resulted in prejudice.

C. Judicial Misconduct and Appellant's Claims

This court evaluates judicial conduct on a "case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury." (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532; *People v. Melton, supra*, 44 Cal.3d at p. 735 ["The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made"].)

"A California trial court may comment on the evidence, including the credibility of witnesses, so long as its remarks are accurate, temperate, and 'scrupulously fair.' [Citation.] Of course, the court may not express its views on the ultimate issue of guilt or innocence or otherwise 'usurp the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses.' [Citation.]" (*People v. Melton, supra*, 44 Cal.3d at p. 735; *People v. Calderon* (1994) 9 Cal.4th 69, 75.) A court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or

create the impression it is allying itself with the prosecution. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) Further a trial court cannot become an advocate for either party under the guise of commenting on the evidence or examining witnesses or casting aspersions or ridicule on witnesses. (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567.) With these principles in mind we turn to appellant's claims on appeal.

Before this court, appellant complains the questions the court asked which mentioned his parole status introduced inadmissible evidence of his criminal history. Furthermore as to the other six instances where the court questioned appellant as described in detail above, he complains the court's questions and comments conveyed the court's belief that his testimony lacked credibility.

Our review of the appellant's testimony on direct and cross-examination leads us to conclude that in a number of instances the court's questioning of appellant was more vigorous and partisan than warranted. In more instances than necessary in this trial the judge inserted himself into the examination with questions or comments and in so doing may have created the impression the court favored the prosecution. This notwithstanding, we also conclude based on the entire record, any judicial misconduct was harmless under all standards by which it is measured.

The evidence against appellant was strong. Most of the factual circumstances surrounding the events at issue were undisputed. Appellant did not deny that he approached the victim after he observed her take the CDs. He did not deny that he took her to private areas of the store, including a breakroom and that he ultimately led her to his car. He conceded that he touched her on the stomach, while trying to retrieve the CDs from her waist band. Where R.P.'s and the appellant's versions of events significantly diverge concerns R.P.'s testimony that appellant touched her in a sexual manner. The only two witnesses to those events were appellant and R.P. The testimony of R.P. on this matter (and all others) was consistent and credible; lending to her credibility was her admission that she intended to shoplift the CDs. This stands in sharp contrast to appellant's testimony which was inconsistent with not only that of several other witnesses but also inconsistent with the initial explanations he gave to the police. In many places in

the transcript appellant's testimony is confusing and internally inconsistent. His description of the incident is disjointed and jumps around in time, sometimes out of sequence. Moreover, in other instances appellant responded using short-hand, incomplete phrases or words. The lack of credibility in appellant's account and its implausibility is clear even from the written transcript. (See *People v. Blanco* (1992) 109 Cal.App.4th 1167, 1176 ["Appellant's claim that he shot the victim without warning, in the back, from some distance away, in self-defense as part of a struggle 'would have strained the credulity of the most gullible jury'"].) Even absent the court's questions and interjections, in our view the jury would have reached the same verdicts. Consequently, any misconduct on the part of the trial judge and any error of appellant's counsel in failing to object to it were harmless. Appellant was not denied a due process or a fair trial on that basis.

II. Prosecutorial Misconduct Claim

Appellant argues the prosecutor committed misconduct and deprived him of due process when (1) he improperly questioned appellant's daughter Jill Lorta; and (2) during closing arguments when he made reference to R.P.'s "truthful" testimony which served to "vouch" for her credibility. As we shall explain, neither of these claims has merit.

A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Cash, supra*, 28 Cal.4th at p. 733, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Where the conduct does not render a criminal trial "fundamentally unfair," it may nonetheless amount to misconduct under state law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Cash, supra*, 28 Cal.4th at p. 733.)

Generally, however, on appeal a defendant cannot complain about prosecutorial misconduct at trial unless the defendant timely objected and requested the jury be

admonished to disregard the impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Otherwise the misconduct is waived unless an admonition would not have cured the harm. (*Ibid.*) To determine whether an admonition would have cured the harm we must consider the conduct in context. If the defendant objected, or if we find the admonition would not have been effective, we look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable a jury would have reached a more favorable result absent the objectionable conduct. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.) With these principles in mind, we turn to the alleged misconduct.

Questions posed to Jill Lorta. During her direct examination Ms. Lorta told the jury that appellant, her father, often stayed with Ms. Lorta's 10- and 6-year-old daughters while Ms. Lorta was at work. Ms. Lorta stated that appellant had never acted inappropriately with her children and that she had trusted her father and had no hesitation about leaving her daughters with appellant. During her cross-examination, the prosecutor asked Ms. Lorta if she was aware of the allegations that had been made in the case against her father, and Ms. Lorta indicated that she had. A few questions later the following exchange occurred:

“[The Prosecutor]: Would you feel comfortable having your ten year old daughter asked to go into the car of a stranger, a 52 year old stranger?”

“[Appellant's Counsel]: I object. It's an improper question.

“[The Court]: I don't know where it's going. Overruled subject to a motion to strike.

“[The Prosecutor]: If you had information that a neighbor wanted to take your daughter into his car and counsel her about something – drugs, alcohol, whatever it was – would you feel comfortable with that?”

“[Ms. Lorta]: It would depend on the person. It would all depend if I knew the person and –

“[The Prosecutor]: You don't. It's a stranger, a man, an adult male in his early 50s you've never met before. Would you feel comfortable letting your daughter do that?”

“[Ms. Lorta]: No.”

Before this court appellant complains the prosecutor engaged in misconduct when he presented the hypothetical scenario and then asked Ms. Lorta whether in view of those facts she would feel “comfortable” about the situation. He argues that the question was not only irrelevant but went beyond testing the sufficiency of the foundation of her testimony to ask her opinion based on additional information.

While appellant did assert an objection to the first question he did not follow-up on the objection and failed to ask for a motion to strike or an admonition to the jury. Appellant argues his counsel’s failure in this regard amounts to ineffective assistance of counsel. As we will explain, we reject this claim because we conclude that the prosecutor’s question was not improper or unfair.

A prosecutor is permitted within the ambit of proper cross-examination of a character witness to inquire, in good faith, whether the witness has heard of specific misconduct of the defendant inconsistent with the trait of character testified to on direct. (*People v. Marsh* (1962) 58 Cal.2d 723, 745.) The district attorney may ask the witness whether he or she has heard rumors about defendant's misconduct “to test the witness's knowledge of defendant's reputation and how truthfully it has been reported to the court.” (*Id.* at pp. 745-746.) This is true even if the crimes charged had no relevance to the character trait testified to by the witness because the witness’ knowledge about community rumors would always be relevant to the qualifications of the witness to speak about the defendant’s reputation. (*People v. Caldaralla* (1958) 163 Cal.App.2d 32, 41.) As appellant here points out, however, such cross-examination should be restricted “to questions which would test the sufficiency of the foundation for the direct testimony, and should not . . . [be] extended to include inquiries as to what the witnesses might think defendant's general reputation in the community would be, or what the witnesses individually might think of him, if they had additional information.” (*People v. Neal* (1948) 85 Cal.App.2d 765, 771.)

Both parties cite these legal principles and rely on these authorities concerning the prosecutor’s authority to question about reputation and rumors. Appellant’s complaint on

appeal about the prosecutor's hypothetical concerning Ms. Lorta's comfort level presents a slightly different situation, however. The questions to which appellant objects did not probe the witnesses' knowledge about the allegations against appellant, nor did they seek to test her awareness of his reputation in the community. Likewise the question does not appear to have been aimed at introducing evidence indirectly through a witness that the prosecutor could not have presented directly. Rather the prosecutor's question appears to have been designed to test the soundness of Ms. Lorta's opinion that she had no hesitation about leaving her children with appellant. Ms. Lorta's response assisted the jury in assessing the weight to assign her opinion and in evaluating her credibility as a character witness; it gave the jury additional input in deciding whether Ms. Lorta's opinion was worthy of trust. In light of Ms. Lorta's testimony on direct, the prosecutor's question was not out of bounds. (See Evid. Code, § 780 and § 1101, subd. (c).) The prosecutor did not commit misconduct in making the inquiry.

Prosecutor's Remarks Concerning the Trustworthiness of the Victim. At the outset of the closing argument the prosecutor stated: "In all my years of trying cases I have never seen a case where the defense version has been more discredited. It's been discredited by logic; it's been discredited by the clear and truthful testimony of a young girl; it's been discredited by the defendant's own testimony. It's completely unbelievable." Thereafter, the prosecutor began to describe and review R.P.'s testimony on direct examination and cross-examination and thereafter stated that "R.P. is telling the truth."

Although appellant did not object during the trial, he argues that the comments concerning R.P.'s truthfulness amounted to improperly "vouching" for R.P.'s credibility. We do not agree.

A prosecutor has wide latitude during argument to urge whatever conclusions counsel believes can properly be drawn from the evidence. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions from the evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 215.) A prosecutor can make "assurances regarding the apparent honesty or

reliability of” a witness “based on the ‘facts of [the] record and the inferences reasonably drawn therefrom.’” (*People v. Turner* (2004) 34 Cal.4th 406, 432-433; citations omitted.) Nonetheless, a prosecutor may not vouch for the credibility of a witness or otherwise bolster the veracity of a witness’ testimony by referring to evidence outside the record. (*Ibid.*) Similarly, a prosecutor may not “place the prestige of [his] office behind a witness by offering the impression that [he] has taken steps to assure a witness’s truthfulness at trial. [Citation.] However, so long as a prosecutor’s assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the ‘facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,’ [his] comments cannot be characterized as improper vouching. [Citations.]” (*People v. Ward, supra*, 36 Cal.4th at p. 215.)

Read in the context of the entire argument, the prosecutor’s brief references to R.P.’s truthfulness do not amount to misconduct. The comments were offered in conjunction with the prosecutor’s review of the evidence presented at trial. They appear to be properly based on facts in the record and inferences the prosecutor urged the jury to draw about the case. While the prosecutor’s reference to “all his years trying cases” was unnecessary and gratuitous, it did not suggest the prosecutor had superior knowledge of evidence outside the record, nor did it place the prestige of his office behind R.P. by offering the impression that he had taken steps to assure R.P.’s truthfulness at trial. Thus we conclude the prosecutor did not engage in misconduct.

III. Cumulative Error

Appellant contends while the judicial misconduct and prosecutorial misconduct errors are individually sufficient to warrant reversal, taken together they violate appellant’s state and federal constitutional rights to due process and a fair trial. We disagree. As discussed elsewhere here, neither of these claims individually warrants reversal. Thus his claim of cumulative error necessarily fails as well. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

IV. Section 667.61, Subdivisions (a) and (d)(2) Kidnapping Enhancement Claims.

Before this court, appellant argues that his enhanced sentence based on the jury’s “true” finding on the section 667.61, subdivision (d)(2) sentencing allegation must be stricken because the trial court gave an inadequate instruction on the enhancement. In addition, he complains that insufficient evidence supported the true finding under section 667.61, subdivision (d)(2). We disagree.

First as to the instructional error, appellant complains that the instruction given—a modified version of CALCRIM No. 3179⁶—was inadequate because it failed to expressly

⁶ The modified version of CALCRIM No. 3179 stated: “If you find the defendant guilty of the crimes charged in Count 3 [Penal Code section 288 (a)—Lewd or Lascivious Act: Child Under 14 years], you must then decide whether, for Count 3 the People have proved the additional allegation that the defendant kidnapped [R.P.]. You must decide whether the People have proved this allegation for Count 3 and return a separate finding as to Count 3. To decide whether the defendant kidnapped [R.P.] please refer to the *separate instructions I have given you on kidnapping*. You must apply that instruction when you decide whether the People have proved this additional allegation. The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.” (Italics added.)

The other instructions the court gave which related to the issues of kidnapping involved a modified version of CALCRIM No. 1200 which provided, in pertinent part:

“The defendant is charged in Count 2 with kidnapping for the purpose of child molestation.

“To prove that the defendant is guilt of this crime, the People must prove that:

“1. The defendant (persuaded/hired/enticed/decoyed/or seduced by false promises or misrepresentations) a child younger than 14 years old to go somewhere;

“2. When the defendant did so (he) intended to commit a lewd or lascivious act on the child;

“AND

“3. As a result of the defendant’s conduct, the child then moved or was moved a substantial distance.

“As used here, substantial distance means more than a slight or trivial distance. The movement must have substantially increased the risk of physical or psychological harm to the person beyond that necessarily present in the molestation. In deciding

inform the jury that they had to find that appellant “kidnapped” R.P. as that term is used in section 667.61, subdivision (d)(2). Appellant claims that “kidnapping” under section 667.61, subdivision (d)(2) refers to the definition of kidnapping in section 207, subdivision (a)—i.e., that he took, held or detained R.P. by use *of force or by instilling reasonable fear*. Appellant argues that rather than giving the modified version of CALCRIM No. 3179, the jury should have been instructed with CALCRIM No. 3175⁷

whether the movement was sufficient, consider all the circumstances relating to the movement. . . .”

The court also instructed with a modified version of CALCRIM No. 1215, which provided, in part:

“Simple kidnapping is a lesser included offense to Count 2.
“To prove that the defendant is guilty of this crime, the People must prove that:
“1. The defendant took, held, or detained another person by using force or by instilling reasonable fear;
“2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance;
“AND
“3. The other person did not consent to the movement[;]
“AND
“4. The defendant did not actually and reasonably believe that the other person consented to the movement. . . .”

Furthermore the court gave a “special instruction” on the “Threat of Arrest” which provided: “An implicit threat of arrest satisfies the force or fear element of simple kidnapping if the defendant’s conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim’s belief is objectively reasonable.”

⁷ CALCRIM No. 3175 provides: “If you find the defendant guilty of the crime[s] charged in Count[s]_____ <insert counts charging sex offense[s] from Pen. Code, §667.61(c)>, you must then decide whether [, for each crime,] the People have proved the additional allegation that the defendant kidnapped ____ <insert name of the alleged victim>, increasing the risk of harm to (him/her). [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

“To prove this allegation, the People must prove that:

which would have informed the jury that it had to find that appellant took, held or detained R.P. by force or by instilling reasonable fear. Appellant argues that CALCRIM No. 3175 contains the definition of kidnapping found in section 207, subdivision (a) and thus satisfies kidnapping element of section 667.61, subdivision (d)(2), while CALCRIM No. 3179 contains no express definition of kidnapping.

The Attorney General responds that appellant misconstrues the enhancement – that section 667.61, subdivision (d)(2) does not refer to a *particular* definition of kidnapping. In the Attorney General’s view, the term “kidnapped” in section 667.61, subdivision (d)(2) could refer to either kidnapping as defined in section 207, subdivision (a) (kidnapping by force of fear) or section 207, subdivision (b) (kidnapping a child under 14

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1. The defendant took, held, or detained _____<insert name of the alleged victim> by the use of force or by instilling reasonable fear;
 2. Using that force or fear, the defendant moved _____<insert name of the alleged victim> [or made (him/her) move] a substantial distance;
 3. The movement of _____<insert name of the alleged victim> substantially increased the risk of harm to (him/her) beyond that necessarily present in the _____<insert sex offense[s] from Pen. Code, §667.61(c)>;

[AND]

4. _____<insert name of the alleged victim> did not consent to the movement[;]

[AND]

5. The defendant did not actually and reasonably believe that _____<insert name of the alleged victim> consented to the movement.]

“Substantial distance means more than a slight or trivial distance. The movement must be more than merely incidental to the commission of _____<insert sex offense[s] from Pen. Code, §667.61(c)>. In deciding whether the distance was substantial and whether the movement substantially increased the risk of harm, you must consider all the circumstances relating to the movement.

“The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.”

years old for purposes of committing an offense under section 288 by means of persuasion, enticements, false promises and misrepresentations).⁸

We agree with the Attorney General’s construction of section 667.61, subdivision (d)(2). In count 3, the information alleged a sentencing enhancement under section 667.61, subdivisions (a) and (d)(2). This section provides in relevant part:

(a) Any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life... [¶¶]

(c) This section shall apply to any of the following offenses: . . . [¶¶]

(8) Lewd or lascivious act, in violation of subdivision (a) of Section 288. [¶¶]

(d) The following circumstances shall apply to the offenses specified in subdivision (c): [¶¶] . . .

(2) The defendant *kidnapped* the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c). (Pen. Code § 667.61, subs. (a) & (d)(2); italics added.)

⁸ Section 207 provides, in pertinent part:

“(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

“(b) Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.” (Pen. Code § 207.)

On its face, section 667.61, subdivision (d)(2) does not specify a particular definition of kidnapping, and thus arguably any of the several statutory definitions in section 207 could apply. Indeed, appellant's support for his claim that the "force or fear" of section 207, subdivision (a) applies comes not from any statute or case law, but instead from CALCRIM No. 3175, and nothing in the Bench Notes accompanying that instruction provides any insight into the drafters' rationale for incorporating the section 207, subdivision (a) kidnapping definition into the instruction to the exclusion of all other definitions of kidnapping in section 207. Likewise we are unaware of any authority that has interpreted section 667.61, subdivision (d)(2) to apply only the kidnapping definition in Penal Code section 207, subdivision (a). In view of the foregoing, we cannot say the court erred in failing to instruct the jury that to find this sentencing enhancement the prosecution had to prove appellant took, held or detained R.P. by use of force or by instilling reasonable fear as defined under section 207, subdivision (a).

In any event, as the Attorney General correctly points out, the court provided an instruction on section 207, subdivision (a) and that the substantial evidence presented at trial supported a finding as to it and thus any possible instructional error is harmless.

Indeed, the section 207, subdivision (a) definition was given as a separate instruction (the modified CALCRIM No. 1215). Moreover, sufficient evidence supported a finding that appellant used force or fear to kidnap R.P. She testified that she was afraid when she got into the car. In addition, appellant escorted R.P. out of Wal-Mart and took her to his car pursuant to an implied threat that R.P. would suffer serious consequences if she did not comply because she had shoplifted the CDs from Wal-Mart. Such an implicit threat satisfies the force or fear element in section 207, subdivision (a) kidnapping. (See *People v. Majors* (2004) 33 Cal.4th 321, 331 ["[A]n implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim's belief is objectively reasonable.].) Thus, in our view, it is not likely that appellant would have obtained a

better result at trial had the jury been given a different instruction on section 667.61, subdivision (d)(2).⁹ The error is harmless under any standard of prejudice.

V. Cruel and Unusual Punishment Claim

Appellant claims that his 85-years-to-life, “Three-Strike” sentence is cruel and unusual punishment because it is disproportionate to his actual crimes. Furthermore, he asserts that because his trial counsel did not object to his sentence on that basis below, his counsel was ineffective. As we shall explain, appellant’s trial counsel did not render ineffective counsel – his sentence is not cruel or unusual in view of his crimes and criminal history.

Appellant must overcome a “considerable burden” in challenging his penalty as cruel and unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) A sentence may violate the prohibition against cruel and unusual punishment if it is so disproportionate to the crime for which it was imposed it “shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424 (“*Lynch*”); *Ewing v. California* (2003) 538 U.S. 11, 20-21 [in non-capital cases the Eighth Amendment contains a “narrow proportionality principle” which precluded sentences that are “grossly disproportional to the severity of the crime”].) In assessing these claims, the *Lynch* court identified three factors for the reviewing courts to consider: (1) the nature of the offense and the offender; (2) how the punishment compares with punishments for more serious

⁹ We reach the same conclusion as to the second clause in section 667.61, subdivision (d)(2) that – “the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense” Although the court did not separately instruct as to the clause, we note the instruction on Count 2 required the jury to make such a finding and thus in returning a guilty verdict on Count 2 the jury necessarily resolved this issue against appellant.

crimes in the jurisdiction; and (3) how the punishment compares with the punishment for the same offense in other jurisdictions. (*Lynch, supra*, 8 Cal.3d at pp. 425-427.)

In arguing his sentence is cruel and unusual, appellant does not compare his penalty with other “Third Strikers” convicted of similarly serious offenses. Instead he compares his sentence to that of a non-strike offender who violates section 288. He complains that his sentence is harsh when compared with others who violate section 288 by engaging in more egregious sexual acts with minors. Appellant’s comparison to a “non-striker” is misguided and illogical. (See, e.g., *People v. Ayon* (1996) 46 Cal.App.4th 385, 400, overruled on different grounds in *People v. Deloza* (1998) 18 Cal.4th 585; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) Appellant is being punished for both his current offense and his prior criminal history, which even he concedes is substantial, under a California statutory scheme which allows for more severe punishment for habitual criminals. Statutory schemes providing for increased punishment for recidivists have long withstood the challenge of cruel and unusual punishment. (See *Lockyer v. Andrade* (2003) 538 U.S.63, 66-77; *Rummel v. Estelle* (1980) 445 U.S. 263, 268; *People v. Weaver* (1984) 161 Cal.App.3d 119, 126 & cases discussed therein.) Thus, his comparison with a non-strike criminal is clearly distinguishable.

We also reject appellant’s effort to characterize his conduct here as not particularly serious when compared to other sexual offenses with minors. While appellant did not have sexual intercourse with R.P., he engaged in other egregious conduct violating section 288. The evidence presented at trial showed appellant approached an unsuspecting minor in the Wal-Mart store and under fraudulent guise of authority and the implicit threat of exposure and possible arrest he essentially forced his 12-year-old victim to leave the public area of the store. Ultimately he escorted her to the secluded confines of his car where his conduct would be unobserved and he sexually assaulted her by fondling her skin and touching her genital areas over her clothes. His conduct warrants this sentence. (Compare *Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875, 884-885 [court found defendant’s 28-years-to-life sentence for failing to update his annual sex

offender registration was grossly disproportionate to his crime because his conduct was an act of omission which did not result in any actual harm].)

Appellant also has a long criminal history dating back to the late 1960s, when as a 16-year-old, a juvenile petition for robbery was sustained against him. As noted elsewhere, over the years he has suffered felony convictions for burglary and escape and has served substantial periods in prison and jail. Thus, in view of his current offense and his recidivism, we conclude appellant's sentence is not shocking or inhumane in light of the nature of the offense and offender, and, therefore, it does not constitute cruel and unusual punishment. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 479, 482-488; [determinations of whether a punishment is cruel or unusual may be based on solely the nature of the offense and offender]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Appellant's sentence also satisfies the second and third prongs of the *Lynch* test. His sentence under "Three Strikes" is on par with other enhanced sentences for repeat offenders which have been upheld by the courts. (See, e.g., *In re Rosencrantz* (1928) 205 Cal. 534, 535-536; *People v. Cooper* (1996) 43 Cal.App.4th 815, 826-27; *People v. Weaver, supra*, 161 Cal.App.3d at pp. 125-26.) In addition, "California's 'Three Strikes' scheme is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders." (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, overruled on different grounds in *People v. Dotson* (1997) 16 Cal.4th 1397.)

Likewise we see no basis for invalidating the sentence under the Eighth Amendment. (See *Ewing v. California, supra*, 538 U.S. at pp. 11, 28-31 [a 25-year-to-life "Three Strike" sentence for shoplifting three golf clubs was not grossly disproportionate]; *Harmelin v. Michigan* (1991) 501 U.S. 957 [sentence of life without possibility of parole upheld for possession of 672 grams of cocaine].)

VI. Errors in the Abstract of Judgment.

The Attorney General points out several errors in the abstract of judgment. First, the abstract of judgment fails to reflect the trial court imposed two five-year prior serious felony enhancements pursuant to section 667, subdivision (a)(1). Second, the abstract of judgment fails to indicate the sentence imposed on Count 3 was imposed pursuant to sections 667, subdivisions (b) through (i), 1170.12 and 667.61. The record of the trial court reflects, however, these circumstances. These minor, clerical errors are easily and appropriately corrected by order of this court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 183, 185-188.)

DISPOSITION

This matter is remanded to the trial court to vacate the abstract of judgment. The abstract of judgment is ordered corrected to reflect the trial court imposed two five-year prior serious felony enhancements pursuant to section 667, subdivision (a)(1) and the imposition of the sentence on Count 3 pursuant to sections 667, subdivisions (b) through (i), 1170.12 and 667.61. The court is further ordered to direct the Clerk of the Superior Court to send the new abstract of judgment to the Department of Corrections.

The judgment, as modified, is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.